Filed 7/27/09 P. v. Rhone CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. STEVEN ALAN RHONE, Defendant and Appellant.	B203239 (Los Angeles County Super. Ct. No. VA098172)

Appeal from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed as modified.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Roberta L. Davis and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Steven Alan Rhone appeals from the judgment entered following his conviction by a jury on one count of dissuading a witness by force or threat and one count of resisting a peace officer. Rhone contends the trial court erred by failing to instruct on a key element—the use of force or threat—of the witness intimidation charge, denying his request to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*) and ordering him placed in restraints during trial. We find no error on the *Faretta* and restraint claims but modify Rhone's conviction on the intimidation count and remand the case for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2006 Los Angeles County Sheriff's deputies were called to the home of Samenthia King to investigate a report of domestic violence. When the deputies arrived, King was inside the house with Rhone, whom she had known for more than 30 years and who had fathered her two children, ages 18 and 23. The front door was open when the deputies arrived, allowing them to see inside the house through the locked security door. For more than an hour the deputies tried to coax King to leave and watched as Rhone spoke softly to her, apparently directing her to tell the deputies everything was all right and they could leave. The deputies, concerned King was being coerced by Rhone, stayed at the front of the house and watched through the security door and the window. One of the deputies videotaped the front of the house during the standoff.

At one point King approached the security door and told the deputies she was fine but refused their request to come out of the house. One of the deputies testified King appeared shaken and scared, although he could not see any injuries and had not seen Rhone brandish a weapon. After more than an hour, King's daughter, who lived with King in the house, arrived and confirmed Rhone had abused her mother in the past. She provided a key to the deputies, who continued to monitor Rhone and King from the front window. When the deputies saw Rhone push King onto the sofa and hit her in the chest, one of them unlocked the security door and slammed it open. Rhone was startled by the entry but did not resist when he was handcuffed and led to one of the squad cars. After

Rhone had been escorted from the house, King told one of the deputies Rhone had said he would kill her before he would let her leave the house and she was afraid he would do it because he had hurt her on other occasions.

Rhone was charged by information with making a criminal threat (count 1) (Pen. Code, § 422),[1] dissuading a witness by force or threat (count 2) (§ 136.1, subd. (c)(1)), false imprisonment by violence (count 3) (§ 236) and two counts of resisting, obstructing or delaying a peace officer (counts 4 and 5) (§ 148, subd. (a)(1)).[2] The information further alleged Rhone had suffered two prior serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and two prior serious felony convictions within the meaning of section 667, subdivision (a)(1). Finally, the information alleged Rhone had served 12 separate prison terms for prior felony convictions warranting sentence enhancements under section 667.5, subdivision (b).

On the day trial was scheduled to begin, Rhone requested he be provided with new counsel based on his lack of communication with his assigned public defender. After conducting a closed hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), the trial court denied the motion. Rhone then requested the court allow him to represent himself or, in the alternative, grant a continuance so he could raise the money to hire private counsel. Under questioning, Rhone admitted he really wanted new counsel, but, if he could not have new counsel, he would choose to exercise his *Faretta* right and represent himself. The trial court denied Rhone's request, concluding it was not "unequivocal" and would unnecessarily delay the trial. When Rhone vigorously protested these rulings, the court stated its concern Rhone would disrupt the proceedings and ordered him shackled during trial.[3]

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1 Statutory references are to the Penal Code.

2 Count 5 was dismissed at the start of the trial.

3 According to the court, the bailiff had overheard Rhone threatening to disrupt the proceedings to precipitate a mistrial. Rhone had also been verbally abusive and used offensive language to the court and to his counsel. The court directed Rhone be shackled

The arresting deputy, King and Rhone were the only witnesses at trial. The People also played the portion of the videotape recorded at the scene and introduced letters written by Rhone to King from prison suggesting she testify in his favor. Midway through the trial, Rhone pointedly placed his hands on the table in front of him, displaying his restraints to the jury and prompting his counsel to request a curative instruction by the court to ignore them. As the jury retired to deliberate, Rhone twice interrupted the court to beg the jury not to convict him.

The jury acquitted Rhone of making a criminal threat but convicted him of dissuading a witness by force or threat and one count of resisting a peace officer.[4] At the commencement of the bifurcated bench trial on the prior conviction allegations, the People amended the information to correctly allege Rhone had suffered only one prior serious or violent felony conviction within the meaning of the Three Strikes law and section 667, subdivision (a). The court found the remaining allegations true and sentenced Rhone to an aggregate state prison term of 19 years: eight years on the witness intimidation count (the upper term of four years doubled under the Three Strikes law), plus enhancements of five years for the prior serious felony conviction and an additional six years for prior prison terms. (The court imposed and stayed the remaining enhancements for prior prison terms under section 667.5, subd. (b).)

DISCUSSION

1. *Rhone's Conviction for Dissuasion of a Witness by Threat or Force Under Section 136.1, Subdivision (c)(1) Must Be Modified to the Lesser Included Offense of Dissuasion of a Witness Under Section 136.1, Subdivision (a)*

Section 136.1, subdivision (a), makes it a crime to "knowingly and maliciously" prevent or dissuade a witness or victim from testifying at a trial or other proceeding. A violation of section 136.1, subdivision (a), may be either a misdemeanor or a felony,

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by restraints and what is known as a "stealth belt" specifically designed not to be obvious to the jury. The court also warned Rhone not to raise his hands or the jury would see the restraints.

[4] After the jury returned without a verdict on the false imprisonment count, the People dismissed that count.

punishable by "imprisonment in the county jail for not more than one year or in the state prison" for 16 months, two or three years. (See § 18.) Section 136.1, subdivision (c), prohibits several more serious forms of witness or victim dissuasion, including "[w]here the act is accompanied by force or by an express or implied threat of force or violence" upon the witness or victim. (§ 136.1, subd. (c)(1).) A violation of section 136.1, subdivision (c)(1), is punishable by two, three or four years in state prison. Both a felony violation of section 136.1, subdivision (a), and a violation of section 136.1, subdivision (c), are "serious" felonies within the meaning of the Three Strikes law and section 667, subdivision (a). (See § 1192.7, subd. (c)(32).)

Rhone was charged under section 136.1, subdivision (c)(1), with dissuasion of a witness or victim by force or threat, found guilty of that offense and sentenced to an upper term of four years for it. In instructing the jury on this count, however, the trial court gave only CALCRIM No. 2622, "Intimidating a Witness (Pen. Code, § 136.1(a) & (b))," which required the People to prove (1) Rhone maliciously tried to prevent King from reporting she was a victim of crime to the police; (2) King was a crime victim; and (3) Rhone intended to prevent King from making the police report.[5] The court failed to give the mandatory second instruction, CALCRIM No. 2623, necessary when the defendant is charged with a violation of section 136.1, subdivision (c). That additional instruction would have required the jury to specifically find "[t]he defendant used force

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[5] The court instructed the jury as follows: "Defendant is charged in count 2 with intimidating a witness, charged with violation of Penal Code [section] 136.1. To prove the defendant is guilty of this crime, the People must prove that: One, the defendant maliciously tried to prevent Samenthia King from making a report that she was a victim of a crime to police; two, Samenthia King was a crime victim; and three, the defendant knew he was trying to prevent Samenthia King from reporting victimization or causing arrest or prosecution and intended to do so. A person acts maliciously when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice. A person is a victim if there is a reason to believe that a federal or state crime is being or has been committed or attempted against him or her. It is not a defense that the defendant was not successful in preventing or discouraging the victim. It is not a defense that no one actually—no one was actually physically injured or otherwise intimidated."

or threatened, either directly or indirectly, to use force or violence on the person or property" of the witness or victim. In short, although the jury returned a verdict form labeled dissuasion of a witness by force or threat under section 136.1, subdivision (c)(1), the jury in fact found Rhone guilty only of the less serious crime of dissuasion of a witness in violation of section 136.1, subdivision (a).

The People concede the trial court erred in omitting the necessary portion of CALCRIM No. 2623 but argue the error was harmless. Generally, "if no rational jury could have found the missing element unproven, the error is harmless beyond a reasonable doubt and the conviction stands." (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 415-416 (*Ortiz*).)[6] In *Ortiz* the defendant dissuaded his victim from going to the police by warning him, "'If you want to live, shut up. . . . If you want to die, speak.'" The defendant later repeated the warning, telling the victim "something would happen" to him if he called the police. Our colleagues in Division Eight of this court held no reasonable jury could have decided the defendant made the statements and also concluded the statements did not threaten the use of force. Consequently, the trial court's failure to instruct on the force element was harmless beyond a reasonable doubt. (*Id.* at p. 416.)

The testimony in this case was far more ambiguous than the testimony in *Ortiz*. The People emphasize King's statement Rhone had threatened to kill her and had been abusive to her in the past as evidence of Rhone's threat of force. According to the People, given that testimony, no reasonable jury could have found the missing element

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[6] Because the Fifth and Sixth Amendments to the United States Constitution require that a criminal conviction rest upon the jury's determination that the defendant is guilty beyond a reasonable doubt of every element of the charged crime (see *United States v. Gaudin* (1995) 515 U.S. 506, 509-510 [115 S.Ct. 2310, 132 L.Ed.2d 444]), the court's error is subject to review under the federal standard for prejudice: "If a trial court's instructional error violates the United States Constitution, the standard stated in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S. Ct. 824], requires the People, in order to avoid reversal of the judgment, to 'prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.'" (*People v. Mower* (2002) 28 Cal.4th 457, 484.)

unproved. If King's testimony had been clear, consistent and unchallenged, the comparison to *Ortiz* would be compelling. But King's testimony about the incident and what Rhone said to her was at times internally inconsistent, and she retracted several statements she had made about the event. She was also impeached with evidence of her past drug and alcohol use and admitted memory lapses. The jury's acquittal of Rhone on the charge of making a criminal threat and its inability to reach a verdict on the charge of false imprisonment (or its lesser included offense) reflect its ambivalence whether, and to what extent, Rhone threatened King. Under these circumstances, we cannot conclude beyond a reasonable doubt the error was harmless.

That being said, outright reversal of the conviction is not appropriate. Although mislabeled on the verdict form, the jury in effect convicted Rhone of a violation of section 136.1, subdivision (a), under the correct instruction. "'"Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial.'"' (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278-1279; accord, *People v. Jackson* (2000) 77 Cal.App.4th 574, 580; *People v. Bechler* (1998) 61 Cal.App.4th 373, 379; see §§ 1181, subd. 6 ["if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed"]; 1260 ["[t]he court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"].)

Accordingly, we modify the judgment with respect to this count by reducing the conviction to a felony violation of section 136.1, subdivision (a), dissuading a victim, and remand the matter for resentencing.

2. *The Trial Court Did Not Abuse Its Discretion in Rejecting Rhone's Request To Represent Himself*

It is now a fundamental precept of our criminal justice system that every defendant, rich or poor, has the right to assistance of counsel and that no accused may be convicted and imprisoned unless he or she has been accorded that right. (See, e.g., *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [83 S.Ct. 792, 9 L.Ed.2d 799] ["in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"]; *Powell v. Alabama* (1932) 287 U.S. 45 [53 S.Ct. 55, 77 L.Ed. 158]; *Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463 [58 S.Ct. 1019, 82 L.Ed. 1461].) Yet a criminal defendant also has the right under the Sixth and Fourteenth Amendments to waive the right to counsel and to represent himself or herself. (*Faretta, supra,* 422 U.S. at p. 819 ["[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense"].) "'A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time . . . because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself.'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1069.)

A defendant's right to self-representation, however, is absolute only if he or she invokes that constitutional right a reasonable time prior to the start of trial. (*People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*) ["in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial"]; accord, *People v. Lawrence* (2009) 46 Cal.4th 186,

191-192.) If a defendant asserts the right to self-representation on the eve of trial or after trial has commenced, the trial court has discretion to deny the request. (*Windham*, at p. 128 ["once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court"]; *People v. Valdez* (2004) 32 Cal.4th 73, 102-103 [*Faretta* motion made moments before jury selection set to begin was untimely]; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [motion for self-representation made on the eve of trial is untimely and is thus addressed to sound discretion of the trial court]; *People v. Clark* (1992) 3 Cal.4th 41, 99-100 [trial court had discretion to deny motion for self-representation because it was made when the trial date was being continued on a day-to-day basis, in effect on the eve of trial]; see *People v. Howze* (2001) 85 Cal.App.4th 1380, 1397 [motion made immediately before or on day of trial is generally considered untimely]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 625-626 [motion made on the Friday before a trial scheduled to begin the following Monday was untimely].)

Given the importance of the right to self-representation, the trial court may not simply deny an untimely motion for self-representation. Rather, "trial courts confronted with nonconstitutionally based motions for self-representation [must] inquire *sua sponte* into the reasons behind the request" (*Windham, supra,* 19 Cal.3d at p. 129, fn. 6) and exercise their sound discretion after considering several factors, including "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Id.* at p. 128; see *People v. Lawrence, supra,* 46 Cal.4th at p. 188 ["[w]hen a criminal defendant who has waived his right to counsel and elected to represent himself under *Faretta* . . . seeks, during trial, to revoke that waiver and have counsel appointed, the trial court must exercise its discretion under the totality of the circumstances, considering factors including the defendant's reasons for seeking to revoke the waiver,

and the delay or disruption revocation is likely to cause the court, the jury, and other parties"].)

Here, Rhone requested to represent himself only after the denial of his *Marsden* motion on the day trial was scheduled to begin. Accordingly, his motion was untimely; and he had no absolute right to self-representation. The court appropriately inquired into Rhone's reasons for the request and determined he was principally motivated by the desire for new counsel. Having already determined in the course of the *Marsden* hearing Rhone was competently represented by his public defender, the court concluded Rhone's request was not "unequivocal" and granting it would unduly delay the trial. There was no abuse of discretion.

3. *The Trial Court Did Not Abuse Its Discretion in Ordering Rhone To Be Restrained*

A defendant's "'appearance before the jury in shackles is likely to lead the jurors to infer that he [or she] is a violent person disposed to commit crimes of the type alleged.'" (*People v. Soukomlane* (2008) 162 Cal.App.4th 214, 231 (*Soukomlane*), citing *People v. Duran* (1976) 16 Cal.3d 282, 290.) Consequently, "'a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints.'" (*Soukomlane,* at pp. 229-230.) "The record must demonstrate that the trial court independently determined on the basis of an on-the-record showing of defendant's nonconforming conduct that 'there existed a manifest need to place defendant in restraints.'" (*People v. Mar* (2002) 28 Cal.4th 1201, 1218.) "'[I]n any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances,' and a trial court should exercise discretion to use less drastic and less noticeable restraints when 'safe to do so.'" (*Soukomlane,* at p. 230; see also *Deck v. Missouri* (2005) 544 U.S. 622, 633, 635 [125 S.Ct. 2007, 161 L.Ed.2d 953] [due process prohibits shackling noticeable by jury unless, in sound exercise of trial court's discretion, case-specific concerns like "special security needs or escape risks" pose threat to essential state interest so as to show "adequate justification" for shackling].)

In *Soukomlane* the Court of Appeal concluded the trial court had abused its discretion in ordering a defendant shackled where the record failed to disclose any evidence to support the order other than the court's nonspecific description of earlier episodes in which the defendant had been distressed and emotional over adverse rulings made by the court. (*Soukomlane, supra,* 162 Cal.App.4th at p. 230.) As the court pointed out, "only if other nonconforming conduct '"disrupts or would disrupt the judicial process if unrestrained"' is shackling *not* an abuse of a trial court's 'relatively narrow' discretion." (*Id*. at p. 232.)

Rhone contends, in essence, the trial court overreacted to his objections to the court's rulings and his occasional profanity, none of which demonstrated a physical threat sufficient to justify shackling. The statements of the court do indeed reflect the court's frustration with Rhone's repeated verbal outbursts and accusations against his counsel, and there is no indication in the record of any physically disruptive or violent action by Rhone. Nonetheless, the court also specifically cited the bailiff's report Rhone had threatened to create a disruption of the trial in order to obtain a mistrial. Under these circumstances we are unwilling to second-guess the court's assessment of the risk posed by Rhone's conduct. Our reluctance is reinforced by Rhone's own failure to abide by the advice of both the court and his counsel not to display the restraints to the jury, an act his own counsel characterized as deliberate.[7]

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[7] Rhone cites *Soukomlane, supra,* 162 Cal.App.4th 214 for the proposition a curative instruction is not adequate to dispel the prejudice associated with restraints (see *id.* at p. 231), but it was Rhone's deliberate conduct that forced his counsel to request the allegedly inadequate instruction.

DISPOSITION

The judgment is modified to reflect a conviction of one count of dissuasion of a witness in violation of section 136.1, subdivision (a), in place of the count of dissuasion of a witness in violation of section 136.1, subdivision (c)(1). In all other respects the judgment is affirmed. The matter is remanded for resentencing.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.